167

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~161.~~ 20

FRANCIS X. DANT, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 12, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 161.

FRANCIS X. DANT, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Francis X. Dant, plaintiff, and the District of Columbia, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 11th day of November, in the year of our Lord 1878, and of the Independence of the United States the 103rd.

[SEAL.] R. J. MEIGS, *Clerk, &c.*
By R. J. MEIGS, JR., *Ass't.*

DISTRICT OF COLUMBIA, *to wit:*

To the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Francis X. Dant is plaintiff and you are defendant, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, chief justice of the said supreme court of the District of Columbia,

Test: R. J. MEIGS, *Clk.*
By R. J. MEIGS, JR., *Ass't.*

1878, Nov. 12th. Service of citation admitted.

A. G. RIDDLE,
Att'y D. C.

(Indorsed:) 9463. F. X. Dant v. Dist. Col. Original writ of error. Filed Nov. 12, 1878. R. J. Meigs.

2 *Declaration.*

In the supreme court of the District of Columbia the day of March, 1872.

FRANCIS X. DANT, PLAINTIFF,
vs.
DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9463

The plaintiff sues the defendant, for that whereas at the time of and for a long time before the bringing of this suit there was and

still is a certain common and public highway in the city of Washington, in the District of Columbia, called Delaware avenue, which highway is used by the good citizens of the United States for passing and repassing therein on foot as well as with horses, carts, carriages, and other vehicles; and whereas said defendant has used and was bound to keep the said highway in repair for the safe and convenient passage and transit of said good citizens of the United
3 States over and through the same; nevertheless, the plaintiff alleges that heretofore, to wit, on the fourteenth day of November, A. D. 1871, the said highway was out of repair and in a dangerous and unsafe condition by reason of the default and negligence of the defendant; and that he, the plaintiff, then and there, to wit, on the day and year aforesaid, while using due care, and while lawfully passing on foot over and above and in the middle of said highway in the night time, stepped down, slipped and fell into a deep and dangerous excavation which was then and there and for a long time before had been in the middle of the highway aforesaid, left open, unguarded, and wholly unprotected through the negligence and want of due care on the part of the defendant, and thereby one of the legs of the plaintiff became and was broken and otherwise injured, and the plaintiff was lamed for life and greatly
4 bruised and wounded; and also by means of the premises the plaintiff became and was sick, lame, and disordered for a long space of time, during which he suffered great pain and was hindered and prevented from transacting and attending to his necessary and lawful affairs, and was deprived of divers gains and profits which otherwise he might have acquired, and was forced to expend large sums of money, amounting in the whole to $500,100 in and about endeavouring to be cured of said fractures, bruises, and injuries, whereby the plaintiff says he has sustained damage in the sum of $10,000, and therefor he brings his suit.

FENDALL & FENDALL,
Att'ys for Pl'ff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise judgment.

FENDALL & FENDALL,
Att'ys for Pl'ff.

Filed March 13, 1872.

5 *Summons.*

In the supreme court of the District of Columbia, the 13 day of March, 1872.

FRANCIS X. DANT, PLAINTIFF,
vs.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9463.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness, D. K. Cartter, chief justice. R. J. Meigs, clerk.

(Endorsed:) Served copies of the declaration, notice to plead, and this summons on the defendant the 14 day of March, 1872.

Pleas.

6 The defendant says that he is not guilty as alleged.

2. And for a further plea the defendant says that it was not entrusted with the care of and no control over the avenue mentioned in the declaration at the time of the occurrence of the alleged accident.

WILLIAM A. COOK,
Att'y for Defendant.

To the CLERK.
Filed May 7, 1872.

Joinder and note of issue.

[Title.]

The plaintiff joins issue upon the defendant's pleas.

FENDALL & FENDALL,
Att'ys for Pl'ff.

Filed May 13, 1872. Fendall & Fendall, att'ys for pl'ff. William A. Cook, att'y for def't. Last pleading filed May 13, 1872. Fendall & Fendall, att'y for pl'ff. To the clerk. Filed May 13, 1872.

7 Proceedings before the supreme court of the District of Columbia holding a special term and circuit court in and for said District, commencing the third Monday, 16th day of October, A. D. 1876.

WEDNESDAY, *November* 15, 1876.

Session resumed pursuant to adjournment, Justice Olin presiding.

FRANCIS X. DANT, PL'FF,
vs.
THE DISTRICT OF COLUMBIA, DEF'T. } At law. No. 9463.

Now again come here the plaintiff, by his attorneys, Messrs. Fendall and Davidge, as the defendant, by its attorney, Mr. Birney, and a jury of good and lawful men of this District, to wit, Cornelius Clark, William Sayer, William Cranford, James W. Drane, Jacob F. Staub, Joseph T. Cook, Thomas W. Chase, John Kehl, James W. Colley, Thomas R. Foote, Edgar Banks, and Charles Ruoff, who, being truly sworn
8 to try the issue above joined, are respited until the meeting of the court to-morrow.

(Minutes 12, page 99.)

THURSDAY, *November* 16, 1876.

Session resumed pursuant to adjournment, Justice Olin presiding.

[Title.]

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the further hearing of the case, are again respited until the meeting of the court to-morrow.

(Minutes 12, page 100.)

FRIDAY, *November* 17, 1876.

Session resumed pursuant to adjournment, Justice Olin presiding.

[Title.]

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the cause is given them in charge, retire to their room to consider of their verdict,
9 with permission, if they agree after reducing their verdict to writing, signing, sealing, and delivering the same to their foreman, to separate until the meeting of the court to-morrow.
(Minutes 12, page 101.)

SATURDAY, *November* 18, 1876.

Session resumed pursuant to adjournment, Justice Olin presiding.

[Title.]

Now again come here the parties aforesaid, in manner aforesaid, and the same jury return into court, and on their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is five thousand dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant five thousand dollars, as aforesaid found, being the money payable by it to the plaintiff by reason of the premises, and $ for his costs of suit, and have execution therefor.
(Minutes 12, page 102.)

10 *Extract from minutes.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, the 16th day of October, A. D. 1876.

JANUARY 5, 1877.

Session resumed pursuant to adjournment.

And thereupon the October term adjourns without day.
(Minutes 12, page 225.)

11 *Defendant's motion for a new trial.*

In the supreme court of the District of Columbia.

FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } At law. No. 9463.

Now comes the defendant and moves the court to grant a new trial in the above cause, and for reasons therefor shows:

1. The verdict rendered for the plaintiff and against the defendant was contrary to law and the evidence in the case.
2. The amount of damages assessed by the jury and found by the verdict, to wit, $5,000, is excessive.
3. That the said jury by their verdict disregarded the instructions of the court upon the law as applied to the evidence in the case.

BIRNEY & BIRNEY,
Attorneys for D. C.

Filed Nov. 18, 1876.

12 *Entry in minutes.*

Proceedings before the supreme court of the District of Columbia holding a special term and circuit court in for said District, commencing the third Monday, 16th day of October, 1876.

SATURDAY, *November* 18, 1876.

Session resumed pursuant to adjournment, Justice Olin presiding.

[Title.]

Now comes the defendant and moves the court to grant a new trial in the above case, and for reasons therefor shows:

1. The verdict rendered for the plaintiff and against the defendant was contrary to law and the evidence in the case.
2. The amount of damages assessed by the jury and found by the verdict, to wit, $5,000, is excessive.
3. That the said jury by their verdict disregarded the instructions of the court upon the law as applied to the evidence in the case.

(Minutes 12, page 105.)

13 TUESDAY, *December* 26, 1876.

Session resumed pursuant to adjournment, Chief Justice Carter presiding.

[Title.]

By Justice OLIN:

Upon argument of the defendant's motion for a new trial, it is considered that said motion be, and the same hereby is, overruled.

(Minutes 12, page 182.)

Appeal to general term.

[Title.]

And now comes the defendant, by its attorney, and appeals from the judgment rendered against it at this term to the general term of said court, having first filed in said cause a statement of the case.

WILLIAM BIRNEY,
Attorneys for Def't.

JAN. 5, '77.

Filed January 5, 1877, R. J. Meigs, clerk.

14 *Certificate.*

The following portion of this record included between page 15 and page 41, both inclusive, and embracing the declaration, pleadings, "case stated," instructions to the jury, verdict, defendant's motion for a new trial, order overruling motion for a new trial, appeal to general term, and certificate of judge, were attached together and filed in the clerk's office as one paper, on the 9th of day of March, 1877.

15 In the supreme court of the District of Columbia, the day of March, A. D. 1872.

FRANCIS X. DANT, PLAINTIFF,
vs.
DISTRICT OF COLUMBIA, DEFENDANTS. } At law. No. 9463.

Declaration.

The plaintiff sues the defendant for that whereas at the time of and for a long time before the bringing of this suit there was and still is a certain common and public highway in the city of Washington, in the District of Columbia, called Delaware avenue, which highway is used by the good citizens of the United States for passing and repassing therein, on foot as well as with horses, carts, carriages, and other vehicles; and whereas said defendant has used and was bound to keep the said highway in repair for the safe and convenient passage and
16 transit of said good citizens of the United States over and through the same; nevertheless the plaintiff alleges that heretofore, to wit, on the 14th day of November, A. D. 1871, the said highway was out of repair and in a dangerous and unsafe condition by reason of the default and negligence of the defendant, and that he, the plaintiff, then and there, to wit, on the day and year aforesaid, while using due care, and while lawfully passing on foot over and above and in the middle of said highway in the night time stepped down, slipped, and fell into a deep and dangerous excavation, which was then and there and for a long time before had been in the middle of the highway aforesaid, left open, unguarded, and wholly unprotected through the negligence and want of due care on the part of the defendant, and thereby one of the legs of the plaintiff became and was broken and otherwise injured, and the plaintiff was lamed for life, and greatly bruised and wounded; and also by means of the premises the plaintiff became and was sick,
17 lame, and disordered for a long space of time, during which he suffered great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs, and was deprived of divers gains and profits which otherwise he might have acquired, and was forced to expend large sums of money, amounting in the whole to $500, in and about endeavoring to be cured of said fractures, bruises, and injuries, whereby the plaintiff says he has sustained damages in the sum of $10,000, and therefore he brings his suit.

FENDALL & FENDALL,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

FENDALL & FENDALL,
Attorneys for Plaintiff.

18 *Pleas.*

In the supreme court of the District of Columbia, 7th day of May, 1872.

FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } At law. No. 9463.

The defendant says that it is not guilty as alleged.

And for a further plea the defendant says that it was not entrusted

with the care of and had no control over the avenue mentioned in the declaration at the time of the occurrence of the alleged accident.

WM. A. COOK,
Att'y for Def't.

Joinder of issue. Note of issue. Trial.

19 *Case stated.*

In the supreme court of the District of Columbia.

FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } At law. No. 9463.

Be it remembered that on the trial of the above cause, at the September term, 1876, of said court, the following testimony was given, and there was no other testimony given.

On behalf of plaintiff, FRANCIS X. DANT testified, in effect:

I am the plaintiff; work at carpenter business; have so worked about twelve or fifteen years; reside on Fifth street, between L and M streets northeast; resided in November, 1871, next door to where I now live; will be 62 years old May 4, 1877. The way the accident happened was: It was a very dark and rainy night; and on returning home, I found that one of my sons had been taken sick, and my wife asked me to go to the apothecary shop at the corner of H and North Capitol street. At that time we had no pavements out that way. It was a very dark night. I met no dangerous places until I got past Second street. I saw the lamp on the corner of H and Second street, and on the other side of the railroad track. I felt my way along safely and got over the commons. There was a brick house on the corner of L and Second street, and as soon as I got to that—I knew that the brick house was on the corner—I followed on until I got to K and Second street east: then I crossed over to the blacksmith shop. I could see a light, and that was all about what I could see. I passed on the west side of Second street between I and K; then I kept feeling and feeling until I got down to the gutter, and then I knew that there was a light by which I always went by, and I looked to my right to see it; a house was on the southwest corner of the alley; as soon as I got there, I looked ahead and saw this light, and I followed that light through. I walked very well until I got the light in my eyes, and the first thing I knew of the place was that I fell over the embankment. As soon as I fell I cried out, "Oh, Lord! Neighbor, please come and help me." This light
20 was on west side of Delaware avenue, that I followed. I took it to be on the corner. There was no lamps in that neighborhood.

Q. When you got down as far as I street, and looking up I street, you could see this light?

A. I always went down Delaware avenue to the apothecary.

Q. Where was this light?

A. It was on the west side of Delaware avenue, about the same height from the pavement. I always saw it, and looked for it on a dark night. I was just coming on the pavement, when I met a young man, and he called me by name. I spoke to him, saying, "Good evening." He continued on down Second street, and got ahead of me.

Q. You spoke of your going down Second street and feeling your way; how did you feel your way?

A. With my foot. It was the curb I was feeling for.

The plaintiff further testified: The gutter was paved; just a little stone put in. The street was paved the same way. The filling of the alley and the street was the same; pavement alike. The lights were in a corresponding position; both private lights in the windows; no lamps other than private lights. Street had been that way for a long time. There was a fence there once [on edge of excavation], but people stole it away; I don't know when. People got down to the pump from east side of Delaware avenue by steps cut in the dirt of the excavation.

Q. How long had it, the fence, been there before you fell?

A. Some twelve (12) months.

Q. Describe the character of the fence?

A. It was a regular post fence, and was intended as a mere temporary fence.

Q. Can you state the depth of the excavation where you fell?

A. Between ten (10) and eleven (11) feet; that is, where I fell down the embankment.

Q. Can you state the width of the roadway?

A. Wide enough for four carriageways. There was a paved sidewalk. They dug that street away twice. They first dug it wide enough for one carriage, and afterwards wide enough to allow two.

Q. All that before you fell?

A. Yes, sir.

Q. There was a house on the east side of Delaware avenue?

21 A. On the west side. There was one house on the hill on the east side. There may have been another little house.

Q. How did persons get to those houses?

A. They came down Second street.

Q. Was the east side of Delaware avenue, where this house of which you speak was, open to travel?

A. You might have got to them.

The plaintiff further testified: As soon as I fell, I hallooed; William Bell, a colored man, came. He lived near. They carried me into his house, until Dr. Bigelow came; then wrapped me up in a blanket and took me home. My leg was broken just above the knee. It is two inches shorter than it was. Dr. Bigelow attended me. I was four months in bed, and four months before I was able to go down street. I have not been able to work for three years; it hurt my leg. Was never an idle man, and was healthy. Worked at flooring, and putting up heavy joists, and shingling roofs. Have done little since the accident. It took me a day to do half a day's work, and I was in bed for ten days afterwards. I have to depend on my friends for a living.

Cross-examination:

Was born here. Lived in many places; did live on I street northeast a couple of months, with my daughter, before I lived where I do now. She lived on I street, between Second and Delaware avenue. Her house was separated by a vacant lot from McNally's store. Could not tell the year I lived there. Lived there for about three months. Don't know where I had been that afternoon before I went home. Was at my sister's house. Did not know McNally before I lived there. He did not keep any grocery store; kept nothing. He might have kept a grocery store; cannot say positive. Believe that, at the time of the accident, McNally kept a grocery there. I knew Michael Heil for forty years, and until his death. He lived, November, 1871, on Delaware avenue, between I and K, to the north of Burhardt's house. Not been often at

Heil's house. I built a stable for him once. Sometimes I would go around there. Got employment from him when he first came to this country.

Q. How far was the place where you fell from the pump?

22 A. I cannot say, because I never had much to do with the pump. It may have been a hundred (100) yards to the south of the pump.

Q. How far was it, the place where you fell, from the steps that led down to the bank of which you have spoken?

A. There were no steps where I fell; the steps were north of me.

Q. How far were the steps from where you fell?

A. Two hundred feet—may be two hundred and fifty feet. I cannot say positively.

Q. When you got to the corner of K street and Second street, did you know where you were?

A. I should think I did.

The plaintiff further testified:

There was no brick pavement around McNally's grocery. It was dirt and gravel. There were two alleys running from Second street to Delaware avenue, on the square between I and K. I went down the one nearest I street. At the mouth, I felt the round cobble stones with my foot. Think there were flagstones, too. There were cobble stones at McNally's corner where the pavement ended, but no pavement on I street it was gravel. Pavement did not go further than the building line at the corner. I hardly ever went down K street. It might have been paved then. I was accustomed to guide myself at night in going down town, when I got to the southwest corner of I and Second streets, by a light which was on Delaware avenue, west side, south of I street, near the corner. "I always went by that light." It was an ordinary one—a light from a house. Where I turned into the alley, there was a house on the right-hand side. As soon as I turned in, I saw a light in a house right ahead of me, on the west side of Delaware avenue, and I made straight for that light. I can't say whether the alley was fenced up on each side or not. I was watching the light. Cannot swear that there were fences on each side. Did not know that Glotzbach's house was on the southeast corner of the alley and Delaware avenue. I saw the light when I was at the east end of the alley; did not take my eyes off it, and I walked straight up to that light, which you see as soon as you enter the alley. It was raining slightly. It was a dark night. I had been living in the neighborhood a few years—a couple of years. Was

23 familiar with the places. Knew the cut on Delaware avenue; passed over it very frequently, not every day. Do not know how many houses there were on Delaware avenue, west side, between I and K streets; there might have been right smart. Was taken into Bell's house when hurt. Heil's saloon was several lots off—two vacant lots. Never looked to see how many front windows there were in Heil's saloon. Do not know anything about the windows. I did not notice that night any light, except the one I was following. I have followed seven or eight different businesses. Do not think the fence stayed several months on the edge of the cut.

Re-examined:

I cannot state positively whether the light which guided me was between I and K streets or south of I; noticed it only at night.

Re-examined by Mr. FENDALL:

Q. In reference to this light, which you say was your guide, was the light between I and K, or was it below I street?

A. I cannot swear positively, because I never saw the light only on dark nights. I did not take notice of it, except at night.

Q. You do not know, then, whether it was on I street or on the other side? Is that house between I and K street or not; or is it below I street, near H street?

A. I do not know positively.

Q. All you know is that when you turned around the corner of I street it appeared to be on a straight line with the sidewalk?

A. I could not swear it was.

Mr. DAVIDGE. You have spoken of what is called an embankment on Delaware avenue, between I and K. I understood that the west side of the avenue had been excavated, had been cut down, and there was a roadway sufficiently wide for one or two vehicles to pass along. I want to know whether that condition of things existed across I street; I want to know where that road began.

A. It began on the other side of I; there was a hill right on the corner.

Q. On the north corner of I?

A. No, sir; on the southwest corner; there was a hill, left there in cutting Delaware avenue through.

Q. When you got down to I street there was no steps from one side of the street to another?

24 A. No, sir.

Q. Walking along I street, and there was a line near the southeast corner of I, still you could walk along I street?

A. Yes, sir.

Q. On the south side of I street there was a little hill?

A. The hill did not prevent me.

Q. You were in the habit of going by the aid of this light?

A. Yes, sir.

Dr. LINCOLN testified:

I examined the limb at the time of the first trial. There was an oblique fracture of the thigh, resulting in the shortening of the leg about two inches, and a projection of the bones, interfering with the action of the muscles. I know the locality of the accident. There was a deep cut in the avenue, leaving a high bank. It was a dangerous place. The present condition of the limb is the natural and necessary consequence of the injury.

Dr. BIGELOW testified:

I am a physician by profession. Examined the injury to Mr. Dant, and considered it a fracture of the lower part of the thigh bone, just above the knee—a fracture going down from near the joint to the porous part of the thigh—an oblique fracture, reaching down within an inch of the knee joint; it is much more difficult to keep them in place when they are near the joint than when they are from it; more difficult to treat. I attended Mr. Dant two or three months; for a month regularly, and after that sometimes once in two days, and sometimes at greater intervals; the limb was impaired, and was shortened a little, not more than an inch. I consider it a permanent injury. It was a dark and rainy night. I got my feet muddy. The embankment was in the middle of Delaware avenue, leading from I to K street, in a northeasterly direction. I considered it (the street) 120 feet wide, and think the excavation may have been in the neighborhood of 40 feet. I think there must have been 70 or 80 feet that was not excavated; there was one house, I think, on the east side of Delaware avenue; I do not remember but one house—

a wooden house, that stood some 80 feet from the embankment on Delaware avenue; I do not know whether it was on the building line or not; this cut part of the street might not have been more than 70 feet
25 wide; there was no lights north of H street except what was from the houses east of the Capitol.

Cross examination:

I found Mr. Dant in a house north of I street, on Delaware avenue; think it was a Mr. Bell's; could not swear to it, as I was not acquainted with the parties; think it was a little nearer I than K; I think the house is standing there now. I could not say whether the pump was north or south of the house; there was a pump, that I can recollect. I think it had been raining just prior to the time of the accident; it was a little misty at that time. There were no houses on the south side of I street; there were houses on the north side. I will not swear positively that I smelt liquor about him that evening; my impression is that I did.

Re-examined by Mr. DAVIDGE:

He answered properly. I was with him until between one and two o'clock. I do not think he was intoxicated; he might have been under the influence of liquor, and yet not intoxicated so much as to impair his mind at the time.

To question by General BIRNEY:

The effect of such an injury on a man would be to sober him.

W. H. BELL testified:

I lived on Delaware avenue, between I and K, in November, 1871. I recollect the night that Mr. Dant was injured. It was between eight and nine o'clock, as near as I can remember; it was a dark night; it had been raining that evening; there was a little mist at that time. Heard a man halloo as I came out of the door of my house, "Oh, neighbor, for God's sake, help me; I have broken my leg." I went to him and helped him out, and took him into my house. Some one helped me to carry him into the house. I wrapped him up in a blanket, and waited until the doctor came; sent for a wagon, and took him home; had been living in that house some two months. The pump was nearly in front of my door—a little south of it; it was a little towards I street. Don't remember how long he remained there; the doctor was sent for right away. The embankment was dug into before I came there.

Cross-examined:

26 I do not know how far from the pump it was that I found Mr. Dant. It was down below Burkhardt's house; it was opposite that vacant lot.

By Mr. DAVIDGE:

I did not perceive that he had been drinking; did not give him any liquor to drink; do not think he asked for any; did not take his shoes off; did not smell the odor of liquor, and did not think that he had been drinking.

[Plaintiff closed here.]

Defense.

Mr. H. BURKHARDT testified:

In November, 1871, lived in the house just opposite to where Mr. Dant broke his leg. I thought he had been drinking; whether he had

or not, could not say. I have frequently seen him before this time. I have seen him in liquor; could not say how often I have seen him drunk; I have seen him often. It had been raining that evening, but was not raining at that time. Heil kept a drinking place on that square, just above me. There were four large pains of glass in the door and four large pains in the window. They were lit up by coal-oil lamps; one behind the counter, one in front, and one on the back of the wall; you could see the light going up Delaware avenue. There was a vacant lot between the house where he was carried into and Mr. Heil's. There was my house, and then Bell's house, and the next house was the drinking saloon. There were fourteen houses on that square. Heil's large show-windows were lit up; and then there was a lamp on the inside.

Cross-examined:

He had his bar-room lowered down; the ceiling was carried on a line with the top of the embankment; I do not know whether there were any lights in the second story or not; he fell a little below my door in the direction of I street; I saw him in Bell's house; I did not help him; I walked along with the rest of them; my sisters went with them; there were some gas-lamps on K, between First and North Capitol; between Delaware avenue and Second street there were no lights; the steps were right north of the pump; from the pump, in the direction of K street, they were about 10 feet; they were wooden steps; my father put them there; do not know how long the fence remained; some of it was taken away the first night it was put up; it was put up on
27 the edge of the embankment; could not say how long before November 14, 1871, the embankment was there; I think it was graded in Mayor Emery's time; it was about a twenty-feet cut.

Re-examined by Mr. BIRNEY:

I had seen Mr. Dant at the house he lived, near McNally's grocery; do not know how long he lived there; I have seen him on the west side of Delaware avenue, near my house, before the accident; I have seen him at Heil's; whether before or after the accident, could not say.

By Mr. DAVIDGE:

I have lived in that neighborhood most all my lifetime; the only time that I remember distinctly that I saw Dant at Heil's was a Saturday night; cannot say whether it was before or after the accident; have seen him there when he was working on the stable; I have a good recollection.

By Gen. BIRNEY:

I have seen him going up and down in that neighborhood; cannot place any time of ever seeing him there except that Saturday night.

By Mr. DAVIDGE:

When I spoke of seeing him about there he would be going to and from home; I could not say how often I have seen him at Heil's; I could not say whether a half a dozen times; it may have been more or less; I have seen him coming up and down very often.

Miss BURKHARDT testified:

I was present when Mr. Dant was picked up on the 14th day of November, 1871. He had not been moved before I saw him. They were going towards him. I went with the rest. I was outside of my house. We had a porch. I stood right at the steps. It had been raining up

to dark. As near as I can remember, I think the steps were a little below the pump, not very far from it; they were towards I street. I do not remember of ever seeing him on that street, if I did, I cannot recall it. This carriageway on the west side of Delaware avenue was wide enough to allow two carriages to pass. There were lights in Mr. Heil's windows at the time of the accident; they were coal-oil lamps; one behind the bar, one in the center of the room, and one at the wall.

28 Cross-examined:

This room of Heil's was on a level with the pavement on the west side of Delaware avenue, just as it is now. I was in one house and Bell in the other, and the pump was about on a line with the middle of them. There was a gutter between the two houses, and this pump was right at the foot of it. The steps, to the best of my recollection, were nearer I street.

JOHN F. CALLAN testified:

I have known Mr. Dant since he moved where he lives now. I clerked for Mr. Dant's son-in-law after the accident. Never saw Mr. Dant drunk before the accident, but have seen him so since.

Cross-examined:

I am sixteen years old.

F. M. JENIFER testified.

Was a metropolitan policeman in 1871; am so now. My beat was in the northeastern quarter of Washington City. Knew Francis X. Dant. Used to see him about every other night, or once or twice a week. I saw him drunk once or twice, and his son, or some other man, took him home; can't say whether that was before or after the accident. Have seen him often, about 1871, at McNally's grocery; have seen him also at the drinking saloon corner of Third and L streets, northeast. It was about 1870 or 1871 that I first knew Dant. I saw him about that time at Heil's. McNally opened his drinking saloon about 1870.

Cross-examined:

Went on that beat in 1869. Saw Dant drunk once or twice, and took it to be his son who took him home. Have seen him two or three times in liquor. Have seen him ten or fifteen times at the drinking place. Can't say how often I saw him. I am positive I saw him twenty times. Would not notice any sober citizen or any one who had not something peculiar about him to attract notice.

WILLIAM F. WALLACE testified:

Was inspector of streets in November, 1871; familiar with the northeastern quarter of the city; it was then thinly populated. Delaware avenue had not been reduced to grade; pavement was laid on west side, from K to I street; roadway cut on west side, about sixteen or twenty feet wide. Delaware avenue was occupied from near Capitol Hill to I street, by the Baltimore and Ohio railroad tracks. From I street north it was not graded, but cutting on the west side be-
29 tween I and K had been done, as stated. There was a partial grade between H and I streets, on west side, and people passed there in carriages. East side of the Delaware avenue, between

H and I, was occupied by the railroad. K street was then paved and sidewalked and a good road. If I had wanted to go from K and Second streets to the northwest corner of North Capitol and H streets, I would have gone along the pavement down K street.

No cross-examination.

MICHAEL HYNES testified:

I was employed in 1871 in removing dirt from the cut on west side of Delaware avenue, between I and K streets. The work was done in March and April, 1871. The road cut was fifteen or sixteen feet.

Cross examined:

Can fix the date. I did the work in March and April, 1871.

Mr. FOLLANSBEE testified:

That he did the improvements in the square between I and K, on the west side of Delaware avenue, above K and north of K, and also filled in on K street, between North Capitol and First street east. He took dirt from Delaware avenue to do the filling in on other streets that were being improved in that vicinity; the width of the cut made in the carriageway in Delaware avenue he judged to be fifteen or sixteen feet; the width of the gutter was that of the ordinary corporation gutter. There was a bank left on the east side of the cut in Delaware avenue. The height of the bank opposite Burkhardt's house on Delaware avenue was about (9) nine feet. The *the* work was finished during the latter part of Mr. Emery's administration. Cannot give the exact date. It was the latter part of the summer, probably in the early part of the fall. It was not a great while before Mayor Emery went out. I street, west of Second and First was graded, he thinks. The foot-pavements, he thinks, were not laid. On K street the foot-pavements were laid under Mayor Emery's administration prior to this accident. The carriageway on K was graded. Second street was graded and paved on both sides. First street was graded. As a general thing, the streets surrounding Delaware avenue were improved. Delaware avenue was not improved.

Cross-examined:

Was improving as commissioner of improvements and buildings. After grading the roadway about fifteen feet wide on Delaware avenue left a high embankment, on an average about nine feet high. This embankment ran as far as K and crossed K. It was broken through by the grading of K; that is, on the south side of K there was an embankment. Am not positive as to whether there was a little embankment on the east side of Delaware avenue and K street. If there was, which I am not sure of, it was not more than two or three feet. The embankment was a great deal higher on the west side of Delaware avenue than it was on the east side. We placed scaffolding along the side of this embankment and nailed boards to it, for the purpose of protecting the public from tumbling over the embankment. The poor people took the fences and boards for fire-wood. I do not think that anybody replaced the fences. I did not put any lamps there. There were gas lamps in that neighborhood, but where cannot state positively. I did not pay any attention to it whatever. I have no memory about the matter, but knew at that time.

ALBERT GLEASON testified:

Prior to 1871 I lived in the northeast quarter of the city—from 1862 to 1865. I have driven over the road in the locality where the accident

happened very frequently about the time of it. There was a carriage-way from about one hundred feet west of the blacksmith shop on K street, which went across the square and went about the center of Delaware avenue, coming out on I street, and went down a slope as it came down I street from being traveled over so much. The slope commenced about one hundred feet west of the blacksmith shop, and came about fifty feet from the corner of Delaware avenue and I street. I was contractor in this locality in 1872. I commenced the grading out I street and went up to K. The road was there when I began to grade.

Cross-examination:

There was a roadway along there when I took hold of the work in 1872. I completed the grading of the avenue. It had been graded from fifteen feet to the curb. I got out the rest of the street about a hundred feet.

DAVID MCCOMBE testified:

I am a civil engineer by profession. I am at present employed under the District Commissioners; have visited the locality of the accident; have made certain measurements, placing myself on Second
31 street, at the eastern mouth of the alley, near I and between I and K, and looking towards Delaware avenue, there was a window directly opposite the western mouth of the alley. I measured the distance from the pavement edge in front of that window, on the west side of Delaware avenue due north, to the pump, and found that it was ninety-two feet, as also the distance of that spot on the pavement in front of the window to the nearest point of a line drawn from the mouth of the alley at Glotzbach's house to the curb line directly opposite Burkhard's house, and I found it to be seventy feet. The distance from the pump to the south line of Heil's house I ascertained to be fifty-two feet. When standing at the pump and looking down the mouth of the alley, I found that the angle made by that line with the curb line on the west side of Delaware avenue was sixty nine degrees. I found the point just opposite the south line of Burkhard's house twenty (20) feet from the curb line; from a line leading from the mouth of the alley to the window opposite the mouth of the alley it would be about fifty-five feet. The width of Delaware avenue is about one hundred and sixty feet. I examined the building on the north side of the alley on Second street, and there were windows on the alley side. I also examined the building at the corner of I and Second, which had two windows on the first floor on I street and also on Second street. In McNally's grocery on Second street there were three lights, and also three on I street. There was a building about thirty-five feet to the south from the southwest corner of Delaware avenue and I street. There was a railroad excavation about th rteen feet deep in I street, corner of Second; it is about thirty feet from that excavation to the curb line just opposite McNally's store. There are buildings on the other side of I street.

Cross-examination:

There was pretty rough ground around here. I lived in this locality from 1859 to 1871. My impression is that the railroad excavation was made about 1871 or '72. I lived about five or six squares from this point; was an engineer at that time, and had business in that locality for the purpose of making a map. It was about 1870 that I was engaged in this service, and was occupied about five or six months. After that I went away to Nebraska. I made those measurements at the request of

General Birney. I saw a window opposite the center of this alley; there was one window opposite the center of this alley; my im-
32 pression is that there were four windows there, and this one opposite the center. I recollect this embankment in 1870. This window that I saw was in the first story. I was well acquainted with the walk along there in 1870. The width of the alley was about fifteen feet; these measurements were made in the day time.

Miss GLÖTZBACK testified:

I live on Delaware avenue, between I and K, and at the mouth of the alley; there are two windows in the house that look on the alley; in 1871, as a sitting room, we used the second-story back room. There was a stable right back of the house, which was on the alley. In 1871 there were six (6) houses then on the north side of I street, between Delaware avenue and Second street. The alley was fenced up on the south side, but do not remember the height of the fence. At that time we went on the west side of Delaware avenue for water. The steps were about 12 feet from the pump, and towards I street.

Cross-examination:

There were about six houses on I street, and they began from the corner of I and Second, and went from there to Delaware avenue. They were scattering, and there were intervening lots between them; they were frame houses, and had yards to them; there were sheds back; it was not a row of houses; we occupied the whole space between the alley and the corner of Delaware avenue and I; there were no houses there; there was a woodyard on the corner; there was a house right beyond the woodyard, a few feet; that was the first house on Second street; next to that there was a vacant space; there was a frame house that was at the corner; there were three of them; there was a house and then a vacant space. We had no particular time for lighting these lights in the sitting room; we always sat in that room, which was on the second story. There was a house on the south side of I and Delaware avenue; it was not exactly on the corner.

EDWARD HEINEMAN testified:

I am by occupation a shoemaker; was in the employ of Mr. Glötzback in 1869 and 1870, and left him in the early part of 1871; drove a cart for him; his stable was out on the alley that run right north of his house; there was a door from the stable bordering on the alley; we got into the alley through this door and went then as far as the corner of the alley and Delaware avenue, and in front of Mr. Glötzback's house we dug out
33 a slope so as to get out of the alley into the street, and then down through this slope to I street; there was a road that ran from K to I street, along Delaware avenue; as near as I recollect, the alley was not on a level with Delaware avenue; just opposite the alley the road was sunk a foot or more; the road from the mouth of the alley did not connect with it; it made no connections. I was acquainted with Mr. Dant; knew him when I saw him. I boarded at Mr. Heil's house in 1871; I saw him there on one occasion; have seen him there at different times; cannot recollect how many; was acquainted with his son; Mr. Dant was in the habit of going to Mr. Heil's house; he invited me to drink with him one time; I do not know whether he had credit there or not; I drank a glass of beer with him, and noticed that he did not pay for it; sometimes I was in the bar-room and sometimes in the kitchen; I have seen him often there, but cannot state how many times; will not

swear I did not see him there one hundred times. I saw him the night of the accident, in front of the blacksmith's shop on K street; I was going down Second street; he came across to the south corner of Second and turned as if he was going towards K; I saw him on K, and he was heading west; he had something black in his hand; I did not form any idea at that time what it was; it was something black; I spoke to him; could not say whether it was a bottle or not.

Cross-examined:

Did not say anything to him about there not being any lights about here. There was an alley between the two sheds, which ran all the way across to K street, but did not run to I street. On I street at that time there were five houses. They were not built in bulk; there were intervening lots between them. There was no house at all on the corner of I street and Delaware avenue; there was nothing but Mr. Glötzback's office. The ground in the alley was above that of I street some seven (7) feet. There was no road leading from the blacksmith's shop over private property, and then going into Delaware avenue, and by means of Delaware avenue into I. The road referred to and over private property does not go into Delaware avenue, but in I street, if anywhere. It was on account of the abrupt fall in our road, made by the cutting down of a part of Delaware avenue, that made it necessary to make our new road.

34 FRANCIS X. DANT, recalled, testifies:

When he left his house on the night of the accident, before he received his injury, that he had a stick in his hand—a heavy cane; did not have any whiskey bottle with me.

Miss TILLEY BURKHARDT, recalled, testifies:

I was present when Mr. Dant was picked up after his injury. I did not see anything picked up after they carried him in. I did not hear anything that was said by the persons who picked him up while they were outside in the street; but after they carried him into Bell's house, I heard it said by a great many in Dant's presence that he was under the influence of liquor; otherwise he would not have fallen down.

Defense closed here.

Rebutting testimony for plaintiff.

JOSEPH BELL testified:

That I lived in a house, in the fall of 1871, on the west side of Delaware avenue, between I and K. It was into my brother's house that Mr. Dant was taken, and I lived with my brother at that time; helped my brother to pick him up; did not observe any odor of liquor about him. He talked very intelligently to me. My brother wrapped him up in a blanket. I do not remember whether he had any assistance or not. Mr. Dant talked to us, and told us how the accident happened.

By Gen. BIRNEY:

He paid us nothing for our services in taking him home on that night, and did not promise to pay us anything.

FRANCIS M. DANT testified:

That I am a son of the plaintiff; that I recollect the day that my father met with his injury; during the afternoon of that day he was

around the house; he was in the condition that he is generally in; he was not under the influence of liquor; for several hours before father left the house that night I was at home sick; he went to get some medicine for me; he was in the house all the time before he went out for medicine; he stated that he would go for the doctor to get something to relieve me; it was a very dark night, and he stated that he dreaded it; I was taken down with typhoid fever, and that was the beginning of it that evening; Dr. Bigelow came home with him at the time he broke his leg, and he attended him; I had lived in the same house with him before this accident three (3) or four (4) years; I am now 27; you could not call him a drinking man; he was the same as all drinking men; he probably would take something, like to day, and then would not touch anything for three months; he did not have the habit of drinking regularly.

Mr. McINTOSH testified:

I have known Mr. Dant for twenty-five or twenty-six years. I do not recollect the particulars about his being hurt. I remember the circumstance. I have been living in the neighborhood for about twelve monts. I never saw him drunk.

Cross-examination:

I am a house carpenter. I lived prior to that time Fifth, between I and K, west. I lived up there about nineteen years in one square; he lived in the neighborhood for about twenty-three years in the same square; have seen him in the streets, and passed him frequently; have visited at his house. I have probably visited at his house once or twice within twelve months; used to meet him in the afternoon, in the street sometimes, two or three times a week. I generally met him after supper.

The following instructions were, on the trial, asked by defendant's counsel, and were granted:

1. The municipal corporation of the District of Columbia had a discretion in 1871 as to the time when improvements in ungraded streets not much used by the public and not in the business part of the city should be made: and if the jury believe from the evidence that a personal injury was sustained by plaintiff by reason of a defect in such a street, and that there was no fraud, malice, or oppression on the part of defendant towards plaintiff, the corporation cannot be held guilty of gross negligence and subjected to exemplary or punitive damages for the mere failure to make the necessary improvement.

2. In considering the question whether the defendant was or not guilty of negligence, the jury should give it the benefit of the date, June 1, 1871, when the organic act creating it a corporation went into operation, and also of the ordinances of the former corporation of Washington City which were not inconsistent with the organic act and were not repealed by the legislative assembly or by Congress.

3. The burden of proof is on the plaintiff, and, in order to recover, he must by proof not only satisfy the jury that he was injured in the manner alleged by him, but also that the injury received was the result of negligence on the part of the District; and if it appear from the evidence of the plaintiff himself that he was guilty of negligence, which contributed to the injury, he cannot recover.

4. The corporation of the District of Columbia is not liable for any injury to the plaintiff resulting from the negligence of the former corporation of the city of Washington. If the jury do not believe from the

evidence that the plaintiff's injury resulted from the negligence of the District of Columbia, the plaintiff cannot recover in this suit.

5. If the jury believe from the evidence that the plaintiff knew that he could have gone by graded, traveled, curbed, sidewalked, and gas-lighted streets to the point of his destination, without encountering dangers in the way from steep banks or cuts, and that he voluntarily chose to go on a dark night by a route which he knew abounded with obstacles, and which for a great distance was not lighted, and that, while endeavoring to pass along it, he fell down a steep bank, of the situation of which he had previous knowledge, and was thus injured, he is to be held to have contributed to the injury, and cannot recover.

6. If the jury believe from the evidence that the District received Delaware avenue between I and K from the former corporation of Washington City in a partially and unopened state, and that said locality was little frequented, thinly settled, and not in a business part of the city, and that there were many opened and more frequented streets which were out of repair when the District government went into operation, the District was entitled to use its discretion as to the time for opening and grading Delaware avenue, and meantime it was bound only to use such care as was reasonably called for by such a locality to prevent accidents to persons using the traveled paths; and that if the plaintiff, well knowing the dangerous condition of the said locality, ventured to pass over it on paths not traveled, he did so at his own risk; and if he received any injury in so passing over it, he cannot recover damages from the District.

7. If the jury believe from the evidence that plaintiff knew the condition of Delaware avenue and of the neighboring streets, and attempted to pass over the same on a dark and rainy night, without a light
37 or other means of preventing accidents, or in a state of intoxication, he was guilty of contributory negligence, and cannot recover damages in this action.

8. If the jury believe from the evidence that the late corporation of Washington had used reasonable care and prudence to prevent accidents, by erecting fences or other barriers near the edge of the bank down which plaintiff fell, and that such fences or barriers had been removed by the wrongful act of third persons, then the defendant is not liable for injuries resulting from such removal, unless express notice was given to the proper authorities of said District of such removal a sufficient time beforehand to enable them to restore such fences and barriers; or unless the removal had existed so long as to justify the presumption that the defendant knew of such removal in time to restore the fences, the plaintiff cannot recover.

9. If the jury believe from the evidence that the plaintiff did not exercise proper care in going where he did, he cannot recover. And on this point the jury will take into consideration whether the plaintiff was familiar with the locality or not; whether he knew the lights from the windows and door of Mr. Heil's drinking saloon; whether he was going or not to said drinking saloon, and whether he was sober or not.

10. If the jury believe from the evidence that the plaintiff was bewildered and lost at the time he was injured, and this without the fault of defendant, and that this condition of mind caused his injury, he cannot recover damages. The municipal corporation was bound to keep the avenue in that part of the city only in such condition that it could be safely used by reasonably careful men in possession of their reason and senses.

38 *Verdict.*

SATURDAY, *November* 18, 1876.

FRANCIS X. DENT, PL'FF,
vs.
THE DISTRICT OF COLUMBIA, DEF'T. } At law. No. 9463.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury returned into court, and, on their oath, say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by defendant, by reason of the premises is five thousand dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant five thousand dollars, as aforesaid found, being the money payable by it to the plaintiff by reason of the premises and $ for his costs of suit, and execution thereof.

October term, 1876, November 18.

FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } At law. No. 9463.

39 Now comes the defendant and moves the court to grant a new trial in the above case, and for reason therefor shows:

1. The verdict for the plaintiff and against the defendant was contrary to law and the evidence in the case.
2. The amount of damages assessed by the jury and found by the verdict, to wit, $5,000, is excessive.
3. That the said jury, by their verdict, disregarded the instructions of the court upon the law as applied to the evidence in the case.

DECEMBER 26, 1876.

FRANCIS X. DANT, PL'FF,
vs.
THE DISTRICT OF COLUMBIA, DEF'T. } At law. No. 9463.

Upon argument of the defendant's motion for a new trial, it is considered that the said motion be and the same is hereby overruled.

In the supreme court of the District of Columbia.

FRANCIS X. DANT, PL'FF,
vs.
THE DISTRICT OF COLUMBIA, DEF'T. } At law. No. 9463.

40 And now comes the defendant, by its attorney, and appeals from the judgment rendered against it at this term to the general term of said court, having first filed in said cause a statement of the case.

WILLIAM BIRNEY,
Attorney for Def't.

Filed Jan'y. 5, 1877.
JAN. 5, 1877.

Certificate of judge.

I, A. B. Olin, presiding judge at the trial of the above cause, do hereby certify that the above is a correct transcript of the pleadings in said cause and of the instructions given to the jury on the trial thereof, and also that the above is a correct abstract of all the testimony given in said cause; that the paper filed herewith, marked "Dant vs. The District of Columbia, No. 9463, Exhibit A" is the map or plat offered in evidence, and referred to in the testimony, and that on account
41 of its size, it is not incorporated with the testimony, but is hereby made a part of the record; that no other testimony was given on said trial; that for the purpose of making a case stated on appeal by the defendant from the verdict of the jury, and the order of the justice refusing a new trial, I sign and seal this paper, and order it to be filed as of the day of appeal, January 5, 1877, the defendant not having been guilty of laches in the case; that to my signing and sealing this paper the plaintiff objects, which objection is overruled by me, and to the overruling of which objection the plaintiff excepts.

A. B. OLIN. [SEAL.]

42 Proceedings before the supreme court of the District of Columbia in general term, commencing Monday, September 24, 1877. Present, Chief Justice Cartter and Justices Humphreys and MacArthur.

WEDNESDAY, *October* 3, 1877.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Olin, Wylie, and Humphreys.

[Title:] At law, No. 9463.

Argued by Mr. Birney, for the District of Columbia, and by Mr. Davidge, for the plaintiff, and submitted to the court.
(3 Minutes, general term, p. 106.)

Motion for new trial on case stated, filed in general term, October 3, 1877.

43 Proceedings before the supreme court of the District of Columbia in general term, commencing Monday, September 24, 1877. Present, Chief Justice Cartter and Justices Humphreys and MacArthur.

SATURDAY, *December* 8, 1877.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Olin, Wylie, Humphreys, and McArthur.

[Title:] At law, No. 9463.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it appears to the court that there is error in the record and proceedings of the circuit court and in its judgment, therefore, it is considered that the said judgment be, and the same is hereby, reversed, and that the cause be remanded to the circuit court to be tried anew.
(3 Minutes, general term, p. 121.)

44 Proceedings before the supreme court of the District of Columbia holding a circuit court and special term in and for said District, commencing the third Monday, 21st day of October, A. D. 1878

WEDNESDAY, *October* 30, 1878.

Session resumed pursuant to adjournment. Cartter, chief justice, presiding.

[Title:] At law, No. 9463.

Now again comes here as well the plaintiff, by his attorney, Mr. Fendall, as the defendant, by its attorney, Mr. Riddle, and a jury of good and lawful men of this District, to wit, James Goddard, Scott Chew, John B. Washington, Edward C. Younger, James F. Oyster, William H. Covington, Nicholas B. Brooks, John Commack, John T. Davis, Henry J. Crier, J. W. Willis, and Charles Groff, who, being duly sworn to try the issue above joined on their oath, say they find said issue
45 for the defendant. Therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of its defence, taxed at $, and have execution thereof.

And thereupon the plaintiff tenders to the court here his bill of exceptions to the ruling of the court on the trial of this case, and prays that the same may be duly signed, sealed, and made a part of the record, which is done accordingly.

And thereupon the plaintiff moves the court for a new trial on exceptions.

(Minutes 14, page 170.)

Motion of plaintiff for a new trial.

[Title:] At law, 9463.

And now comes the plaintiff in above entitled cause and moves the court to set aside the verdict and for a new trial, and for cause
46 shows that the court erred in the rulings of divers matters of law, which errors will appear by reference to the bills of exceptions prayed and taken at the trial.

REGINALD FENDALL,
Att'y for the Plaintiff.

Filed Oct. 30, 1878. R. J. Meigs, clerk.

47 *Bill of exceptions—Plaintiff's.*

In the supreme court of the District of Columbia.

FRANCIS X. DANT, PLAINTIFF,
vs.
DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9463.

Upon the trial of this cause the plaintiff, to maintain the issue on his part joined, gave evidence tending to show that he is sixty-three years of age; is a carpenter by trade, and followed that particular branch of the trade which required him to climb and to lift heavy joist; that on the night of the 14th of November, 1871, at about 8 o'clock, he arrived at

his home on 5th street, between L and M northeast, by a route which he habitually travelled in safety, and which was safe; that immediately upon his arrival he was met by his wife with the intelligence that his son was ill, and that he must go at once to the apothecary for medicine; that he at once started to go for the medicine, along the route he had just passed over, intending to go to an apothecary store on the
48 corner of H and North Capitol streets, the nearest apothecary store to him; that the night was very dark and rainy, and he could not see, and he had to feel his way. He lived in that locality for three years, and passed this cut as often as twice a day, and knew perfectly well that the cut was there; that he would not have gone up there if he had known what he was about; that even in day time, if he had gone up by the alley he could not have got down, and that he made a mistake in consequence of the darkness of the night; that there were no lamps and no lights of any description along the route, and never had been; that, in consequence of the darkness of the night and the absence of lamps, in his way down 2d street to Delaware avenue he turned into a public alley, which was nearest to I street; that his reason for supposing it to be I street was that he felt the depression in the ground, the cobblestones of the gutter, and the termination of the pave-
49 ment; and that he saw opposite the opening of the alley a light in a window projecting from the west, exactly as the light in the window would have appeared from the corner of I street; that thus misled, and proceeding with haste along said alley and over an elevated plain forming the unoccupied part of Delaware avenue, he fell down an excavation ten feet deep in the middle of Delaware avenue, between I and K streets, where also there were no lights other than such as were in a house on the west side of Delaware avenue; that in the fall the plaintiff broke his leg above the knee, the fracture being oblique; that the plaintiff had always known that there was one alley intersecting this square, but that he had not previously noticed that there were two; that on this night, having felt the depression in the ground which marked the first alley, when he came to the second depression he never doubted that he had reached the corner of 2d and I; that to the
50 street as well as the alley there was no paved sidewalk, and to complete the resemblance there was a small house at the corner of the alley, and a small house at the corner of 2d and I; that the plaintiff was aware of the excavation in Delaware avenue, but had not expected the route he travelled would lead him to it; that said excavation was caused by the corporation of the city of Washington (during Mr. Emery's administration, and in 1870) cutting down the surface of the west half of Delaware avenue about ten feet, and leaving the east half as its old grade, on a plain with 2d street, and with a continuous surface thereto; that there were houses on the east as well as the west side of said Delaware avenue, between I and K streets, and to pass from one to the other persons had to go up and down a flight of wooden stairs, which were placed there very soon after the excavation, about which time a fence was run along the edge of the excavation, from I to
51 K streets; that this barrier, broken and impaired from time to time, had entirely disappeared within six months after its erection and twelve months before this accident, and had never been renewed; that by reason of this accident plaintiff was confined to his bed for about four months, during which time he suffered great pain, mental and bodily; was at expense in procuring medicines and medical attendance; had his right leg shortened two inches, and was crippled for life; that there were other unobstructed routes by which the plaintiff could have reached his

intended destination; that on the western side of Delaware avenue there was a good sidewalk, and about one-half of said avenue was in a good and safe condition for travellers alongside of the place of the accident; and thereupon the plaintiff further gave in evidence the charter of the city of Washington, being the act of incorporation and the acts
52 supplementary to and mandatory of, and in continuation of the same, passed by the Congress of the United States and approved, respectively, May 15, 1820; May 26, 1824; May 20, 1826; May 17, 1848; May 28, 1868; April 7, 1869; also the act of incorporation of the District of Columbia, passed by the Congress of the United States and approved on 21' February, 1871.

And there the plaintiff rested.

Whereupon the court instructed the jury that the state of facts presented by the evidence constitute a state of mixed fault, or contributory negligence, and that the District is not therefore responsible in damages, and that they must return a verdict in favor of the defendant.

To which portions of said charge in which the court instructed the jury that the state of facts presented by the evidence constitute a state of mixed fault or contributory negligence, and that the District is not responsible in damages, and instructs the jury to return a verdict
53 in favor of the defendant, the plaintiff excepted separately before the jury retired, and prays the court to sign, seal, and cause to be enrolled this his bill of exceptions; which was duly done this 30th day of October, A. D. 1878.

[SEAL.] D. K. CARTTER,
Ch'f Just.

Filed Oct. 30th, 1878. R. J. Meigs, clerk.

[Title.] At law, 9463.

1878, October 30. Case calendared for general term. (Docket entry.)
1878, Nov. 2. Bond for appeal to general term filed. (Docket entry.)

54 *Final judgment.*

Proceedings before the supreme court of the District of Columbia, in general term, commencing Monday, September 23, 1878. Present, Chief Justice Cartter and Justices Wylie and Humphreys.

MONDAY, *November*. 11, 1878.

The court resumes its session, pursuant to adjournment. Present, presiding, Mr. Justice Wylie, and Associate Justices Humphreys and MacArthur.

[Title.] At law, 9463.

And now again come here, as well the plaintiff as the defendant, by their respective attorneys. And thereupon, because it seems to the court that there is no error in the record and proceedings, or in the judgment of the circuit court, therefore it is considered that the judgment aforesaid be, and hereby is, affirmed, with costs, to be taxed by the clerk, notwithstanding the motion for new trial upon exceptions.

(3 Minutes, general term, page 260.)

55 *Appeal bond to general term.*

In the supreme court of the District of Columbia, the 2d day of November, 1878.

FRANCIS X. DANT, PLAINTIFF,
v.
DISTRICT OF COLUMBIA, DEFENDANT, } No. 9463.

The plaintiff having appealed to the general term from the judgment pronounced herein on the 30th of October, 1878, in the circuit court, and Joseph M. Dant, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

F. X. DENT, *Appellant.*
JOSEPH M. DENT, *Surety.*

Witness:
SAMUEL N. COX.
Approved.

D. K. CARTTER,
Chief Justice.

Filed Nov. 4, 1878.

56 In the supreme court of the District of Columbia, the 12th day of November, 1878.

FRANCIS X. DANT
vs.
THE DISTRICT OF COLUMBIA. } At law. No. 9463. In error.

Know all men by these presents, that we, Francis X. Dant and George W. Dant, are bound unto the above named District of Columbia, in the sum of five hundred dollars, to be paid to the said District of Columbia and its successors. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 12th day of November, 1878.

Whereas the above named Francis X. Dant has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Francis X. Dant shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

F. X. DANT. [SEAL.]
GEO. W. DANT. [SEAL.]

Sealed and delivered in presence of—
Witness:
SAMUEL W. COX.
Approved.

D. K. CARTTER,
Chief Justice.

Filed Nov. 12, 1878. R. J. Meigs, clerk.

57 *Authentication of record.—Clerk's certificate.*

CLERK'S OFFICE,
Supreme court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 22' day of November, 1878.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Assistant Clerk.*

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 22' day of Nov. 1878.

D. K. CARTTER, *Chief Justice.* [SEAL.]

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 22' day of Nov., 1878.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Assistant Clerk.*

58 *Rules of the supreme court of the District of Columbia.*

RULE 2.—TERMS OF THE COURT.

The general term:

1st Monday of January.
3d Monday of April.
4th Monday of September.

The circuit court:

4th Monday of January.
2d Monday of May; which term shall not continue beyond the 3d Saturday in July, except to finish a pending trial.
3d Monday of October.

The district court:

1st Monday of June.
1st Monday of December.

The criminal court:

1st Monday of March.
3d Monday of June.
1st Monday of December.

The special term:

1st Tuesday of every month save August, in which month there is no court.

59 RULE 60.—MOTIONS FOR A NEW TRIAL.

Motions for a new trial, which are designed to set aside a verdict and procure a new trial of a case, are of two kinds, to wit:

1st. Those which are grounded upon alleged error of law by the justice presiding in his rulings during the trial, in admitting or excluding evidence, or in his instructions to the jury; these motions must be made upon a bill of exceptions, and are to be heard in the general term in the first instance. But the justice who tried the cause may, in his discretion, entertain a motion on exceptions taken at the trial to set aside the verdict for error in law.

2d. Those which are grounded upon the following and similar allegations:

(1.) That the party moving for the new trial had no notice, and did not appear at the trial.

(2.) Misbehavior of the successful party.

(3.) Misbehavior of the jury.

(4.) That the verdict is contrary to the evidence.

60 (5.) That the verdict is unreasonable or uncertain.

(6.) That the verdict was obtained by surprise.

(7.) That a new and material fact, unknown at the time of the trial, and not ascertainable by reasonable diligence by the party moving, has come to light since trial, and the like.

These motions are addressed to the discretion of the justice presiding at the trial, and are not appealable.

RULE 61.

Every motion for a new trial shall be in writing, and shall state in separate paragraphs, successively numbered, the grounds upon which it is based; and it shall be entered on the minutes of the court on the day it is presented to the court.

All motions for new trial must be made within four days after verdict.

RULE 64.—EXCEPTIONS.

61 If a party proposes to have errors of law in the rulings or instructions of the justice presiding reviewed, either in the general term or in the Supreme Court of the United States, he must, at the trial and before verdict, except to such rulings or instructions; and he may, at the time of taking exception, reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes, and proceed with the trial, and afterwards settle the bill of exceptions; but, on the demand of the attorney of either party, the bill of exceptions shall be settled and signed before the jury retire.

RULE 65.

The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it.

RULE 68.

In every case the fact of the settling and filing of the bill of exceptions, and that it is made part of the record, shall be noted on the minutes of the court.

62 *Certificate.*

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing rules numbered respectively 2, 60, 61, 64, 65, and 68, are rules adopted by said court, and that the same since June 22, 1875, have been, and still are, in force.

In witness whereof I hereunto set my hand and the seal of said court.

[SEAL.]

R. J. MEIGS,
Clerk S. C. D. C.,
By R. J. MEIGS, JR., *Asst.*

(Indorsement on cover:) No. 161. Francis X. Dant, plaintiff in error, vs. The District of Columbia. District of Columbia sup. court. Filed 12th February, 1879.

SUPREME COURT U. S.
FILED
DEC 8 1881
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 161.

ADMINISTRATOR OF FRANCIS H. DANT

vs.

THE DISTRICT OF COLUMBIA

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT.

A. G. RIDDLE,
Attorney for the District of Columbia.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 161.

ADMINISTRATOR OF FRANCIS H. DANT

vs.

THE DISTRICT OF COLUMBIA.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT.

First. I submit that by the death of the plaintiff sug gested to the Court the suit is abated. That this suit is not one in which the cause of action survives under section 955 (Rev. Stats., 180,) of the Revised Statutes, is apparent from the declaration.

That counts, upon an injury to the person, the fracture of a leg, by falling into a dangerous excavation within one of the streets of the city of Washington, while the plaintiff was passing over the same, in the night season, (Rec., p. 1.)

It is not the practice in the District or in Maryland to plead in abatement, but the fact is brought to the notice of the court.

This cause of action is within the common law rule, *actio personalis moritur cum persona.*

3 Black Com., 302.

1st Chitty Pl., 11th Am. Ed., 68, and notes.

Hambly *vs.* Trott, Cowper, 372.

United States *vs.* Daniel, 6 Howard, 1116, Curt., 583.
Henshaw *vs.* Miller, 17 Id., 212.
Wilbur *vs.* Gilmore, 21 Pick, 250.
Chichester *vs.* Transfer Co., 1 McArthur, 295.

It has been thought that the Maryland act of 1785, changed the rule for that State and for the District.

2 Kilty's Statutes, chap. 80.
See also the act of 1798, Chap. 101, Sub Ch. 14, *Id.*

Section 1 of the first-named act declares: "That no action brought or to be brought, in any court of law in this State, shall abate by the death of either of the parties to such action."

While section 4, of the latter, says: "No personal action shall abate by the death of either party." Curiously enough I have found no judicial construction or comment upon the acts by the courts of Maryland for over eighty years after the passage of the first. Notwithstanding these statutes, as is observed by Mr. Evans, it always was the opinion of the Maryland bar that personal actions for injuries to the person did abate by the death of the party.

Evans' Practice Md., 199.

And quite conclusive of this matter, section 5 of Sub Ch. 8, of the last quoted statute, Chapt. 101, provides that executors and administrators may commence and prosecute all the personal actions which the deceased "might have commenced and prosecuted, except actions for slander, and for injuries or torts done to the person."

2 Kilty, 1798, Ch. 101, Sub title 8.

A statute of Maryland, act of May 25, 1852, (chap. 299,) authorizes a suit for the death of a person caused by the wrongful act of another. The preamble recites: "Whereas no action at law is now maintained in this State against a

person who, by his wrongful act, neglect or default, may have caused the death of another person."

See also Sec. 3, ch. 1497, Dorsey's Stats., 632.

There are other provisions of the Maryland statutes going to show that the first section of the act of 1785 intended to deal with rights and injuries involving property only. Indeed, this is apparent by a careful examination of the interminable first section.

The Supreme Court of the District was right in declaring that there was no statute in force in the District whereby a suit for an injury to the person could survive to the decedent's representative.

Case cited from 1st McArthur.

Finally, in 1869, the Maryland Court of Appeals, in the case of the Baltimore and Ohio R. R. Co. *vs.* Ritchie, declared that suits for injuries to the person and character die with the person, and cannot be maintained by the representatives of the deceased party; that before the acts referred to all personal suits abated by the death of the party, and the representative had to commence anew; that these acts only enabled representatives to prosecute suits already commenced—that did not abate at common law.

31 Md. Reps., 191–199.

Second. It is contended for the plaintiff, however, that the first judgment set out in the record, rendered in his favor on the verdict in the first trial, remains in law unimpaired by the subsequent proceedings of the court in the case; that in effect the Court in General Term did not acquire jurisdiction of the case, and that its judgment reversing the judgment of the Circuit Court was for that reason erroneous, and that the subsequent trial, verdict and judgment go for naught; and while the suit, if pending, would abate by the death of Dant, in law it was concluded in his life-time,

and the plaintiff now seeks to have this made judicially to appear, and that is all he seeks now by his writ of error.

Against this position may be urged—

I.

The judgment of the General Term reversing said first judgment was not a final judgment, and cannot be inquired into in this Court on error.

Houston *vs.* Moore, 3 Wheaton, 433.

Tracy *vs.* Holcomb, 24 Howard, 426, and numerous cases.

It seems to me to be equally clear that if you cannot examine the judgment of the General Term, you cannot review the various subordinate steps which conducted to it.

Obviously all the objections which the plaintiff had to those intermediate proceedings were urged to the Court on that hearing, and so were a part of it. If they were not, he cannot raise them now.

He is here now complaining of the last, the final, judgment of the General Term, and of the proceedings involved in that.

How can he now be heard to complain of the proceedings preliminary to the first judgment?

What question for this Court can he raise by his so-called exception to the case certified?

His action was merely to show that he objected to the order of the Court—did not acquiesce in it; but it can perform no other office, while the case and mode and the time of making it, recognized and accepted as they were by the Supreme Court as conducting the case properly within its jurisdiction, must stand or fall with the judgment itself.

The writ of error in this case is prosecuted for alleged errors in the last judgment, and in the proceedings which led up to that—steps taken by the plaintiff to bring the case

here—and upon those alone can he be heard now, if at all, as is submitted.

Had the plaintiff's counsel denied the jurisdiction of the Supreme Court in General Term, staid away, and refused to submit himself and his case to its action, some warrant might be found, at least in his own conduct, for his present position. But he appeared in that Court, argued the cause on its merits, went back to the Circuit Court and retried his case there, took his exceptions to the ruling on that trial, and is here on his writ of error to reverse that judgment, and clearly he cannot now be heard to contend that there was anterior error and want of jurisdiction. Why did he not have the Court make a final disposition of his case, and bring it here before? Clearly if he could not have secured a hearing on this matter then, he cannot now.

II.

It is submitted that in the proceedings complained of itself there was no error.

The verdict and judgment were rendered November 18, 1876, and on the same day the defendant filed the motion for a new trial.

Rec., p. 4.

December 26, the motion was overruled, and the defendant appealed to the General Term the same day.

Rec., p. 5.

The term adjourned finally the 5th of January, 1877.

Rec., p. 4.

The case was sealed by the judge trying the case on the 9th of the following March.

Rec., p. 5.

The certificate sets forth that the defendant was without *laches*, and the same was ordered to be filed as of the 5th of January preceding, to which the plaintiff's counsel objected and excepted.

Rec., p. 21.

The following are the provisions of law bearing on this matter:

SECTION 803. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed.

SECTION 804. The justice who tries the cause may, in his *discretion*, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had.

SECTION 805. When such motion is made and heard upon the minutes an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

SECTION 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term. (Revised Statutes of the United States, relating to the District of Columbia, pp. 95 and 96.)

The rules of the Supreme Court of the District, applicable to the case, are found on page 27 of the Record. The proceedings are found to be in accord with the requirements of the statute but conflict with the sixty-fifth rule, if that applies to a case as prepared. The case was certified on the 9th day of March, after the lapse of the term, which,

for the purpose of settling exceptions, might have been continued.

Clearly a court has a discretion to suspend its own rules, where it is a pure matter of a rule, and not of statutory law, and perfect a proceeding necessary in its judgment to further the ends of justice; and this is purely a matter of discretion, which cannot be reviewed.

In this instance all that was done was merely to embody and put together in paper what was matter of record, and what had been delivered in open court, on the trial, like the putting in proper form, an exception, taken at a trial, in presence of the jury. This rule sixty-five the court, for ample reasons, suspended, so far as to certify the case.

When the case reached the general term, this case, bearing the date of March 9, 1877, was before it. It knew that the term ended January 5th. It, as it might, sanctioned this suspension of the rule, and gave effect to the proceedings; and by the reversal of the judgment on hearing, it is made apparent that the suspension of the rule was entirely warranted, was necessary to a due administration of law.

The case of the *United States* vs. *Breitling*, (20 Howard, 252,) fully covers the action of the courts below in this case, and disposes of this point.

In my view of this case, it is unnecessary to inquire whether there is error in the matter set forth in the writ, and which alone could be a matter of inquiry and consideration. I am very willing that it should be held that there is

A. G. RIDDLE,
Attorney, D. C.